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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

MARY ELLEN KIMBLE
Petitioner,

v.

THE WORTH COUNTY R-III BOARD
OF EDUCATION
Respondent.

WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Missouri statute providing for dismissal of a teacher for "immoral conduct" unconstitutionally vague?

2. Was the Missouri statute providing for dismissal of a teacher for "immoral conduct" unconstitutionally applied by the court below since that court failed to adequately determine whether there was a nexus between the teacher's alleged misconduct and her fitness to teach?

3. Was the termination of the teacher in retaliation for the exercise of her right to freedom of speech thereby violating the first and fourteenth amendments?

4. Was the decision which was adverse to the teacher violative of her due process rights since important evidence supporting her was not considered?

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OPINIONS BELOW

The Findings of Fact and Decision of the Worth County R-III Board of Education dated May 10, 1982, is unreported and is set out in the Appendix at A-48 to A-58. The Judgment of the Circuit Court of Worth County, Missouri, Division I, dated June 24, 1982, is also unreported, and is set forth in the Appendix at A-44 to A-47. The judgment of the Missouri Court of Appeals dated March 20, 1984, is reported at 669 S.W.2d 949 and is set forth in the Appendix at A-1 to A-43. The Order of the Supreme Court of Missouri denying transfer dated June 19, 1984, is set forth in the Appendix at A-59 to A-60.

JURISDICTION

The judgment of the Missouri Court of Appeals, Western District, reversing the decision of the Circuit Court of Worth County, Missouri, to reverse the School Board and reinstate Ms. Kimble was entered on March 20, 1984. The Court of Appeals denied a timely filed motion for rehearing or transfer to the Missouri Supreme Court on May 1, 1984. The Missouri Supreme Court, on June 19, 1984, denied a motion for transfer to that court. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV § 1:

No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Mo. Ann. Stat. § 168.114 (Vernon Supp. 1984):

1. An indefinite contract with a permanent teacher shall not be terminated by the board of education of a school district except for one or more of the following causes:

(1) Physical or mental condition unfitting him to instruct or associate with children;

(2) Immoral conduct;

(3) Incompetency, inefficiency or insubordination in line of duty;

(4) Willful or persistent violation of, or failure to obey, the school laws of the state or the published regulations of the board of education of the school district employing him;

(5) Excessive or unreasonable absence from performance of duties; or

(6) Conviction of a felony or a crime involving moral turpitude.

2. In determining the professional competency of or efficiency of a permanent teacher, consideration should be given to regular and special evaluation reports prepared in accordance with the policy of the employing school district and to any written standards of performance which may have been adopted by the school board.

STATEMENT OF THE CASE

This petition asks this Court to consider whether various constitutional rights of a teacher who was dismissed by a School Board were violated by the Board and by the statute providing for dismissal for "immoral conduct." Those rights include freedom of speech and due process.

The Petitioner (hereinafter Ms. Kimble) had been employed by the Worth County, Missouri, R-III Board of Education (hereinafter the Board) for a number of years in the capacity of librarian with some teaching duties. She had consistently received good evaluations. During the 1981-82 school year she was elected by her fellow teachers to a position of trust and confidence as Secretary-Treasurer of the Community Teacher's Association (hereinafter C.T.A.).

In November of 1981 she was requested by her fellow members of the C.T.A. to inquire as to the reason why the C.T.A. dues of the administrators of the Worth County R-III School District were paid by the Board, but the dues of the teachers were not. She did inquire concerning the issue to her friend and neighbor who was President of the Board. (See A-93 to A-95) Evidence shows that when the Superintendent found out about this, he summoned Ms. Kimble to his office, threatened to take her teaching certificate, and told her that he would love to slap her with an unprofessional conduct suit. Id. He stated thereafter that he was going to get rid of Ms. Kimble.

Shortly thereafter, on March 1, 1982, he brought charges pursuant to a statement of charges dated February 28, 1982, against Ms.

Kimble alleging that she was guilty of "immoral conduct" in violation of M.A.S. § 168.114.1(2) (Vernon 1965), authorizing dismissal on that ground. (See A-61 to A-65) In addition to setting forth Ms. Kimble's constitutionally protected inquiry of the Board President, the statement listed as a ground for dismissal an allegation that Ms. Kimble had ordered a book for the school without having signed a request form or purchase order. Id. The statement also listed as grounds for dismissal a number of trivial incidents in which items of extremely low value had disappeared from the school premises and were later returned. These items included a teapot in the 1973-74 school year, a battery jar in the 1974-75 school year, gate receipts in the 1976-77 school year, Avon jewelry in the 1977-78 school

year, a cookbook in the 1980-81 school year, and a set of books in 1982. Id. The evidence linking Ms. Kimble to those incidents was conflicting and weak.

The circumstances therefore strongly indicate that Ms. Kimble was dismissed because of her constitutionally protected speech, and the other asserted grounds were merely pretextual. This issue was raised before the Missouri Court of Appeals by Ms. Kimble in her initial brief wherein it is stated: "It is important to recognize when reading the testimony of the administrators that each has an axe to grind because of [Ms. Kimble's] activities with the C.T.A." Additionally, in Ms. Kimble's "Suggestions in Support of Motion for Rehearing" she stated: "The only evidence [that she was unfit to teach] was generalities stated by the school

administrators who were out to get her because of her activities with the C.T.A."

Important evidence which might have caused the Board and court below to have reached a conclusion favorable to Ms. Kimble was not considered at all. Among the allegations against Ms. Kimble was an accusation that she had taken and subsequently returned by check twenty dollars in gate receipts received during a basketball game. (See A-62) Ms. Kimble denied either taking or replacing the money and submitted as evidence to the Board all of her cancelled checks from the period of time in question. Since no twenty dollar checks to the school were written during that period, this evidence strongly corroborated Ms. Kimble's testimony. However, while the cancelled checks were in the possession of the Board, one twenty

dollar check disappeared, thus leaving doubts in the minds of the Board members as to Ms. Kimble's truthfulness. For example, Judge Anthony P. Nugent, of the Missouri Court of Appeals, in his concurring opinion, stated:

> Her bank statements and checks for December, 1976 and January, 1977, were admitted into evidence. Although no twenty dollar check to the school was included in the exhibits, the December, 1976 bank statement shows that two twenty dollar checks were written. Only one of these twenty dollar checks is included in the exhibits.

(See A-30)

After the hearing before the Board, two bank employees signed affidavits showing that none of the cancelled twenty dollar checks from the period in question were written to the school. (See A-66 to A-69) Ms. Kimble and her husband attested to the fact that none of the checks submitted as evidence were written for twenty dollars to the school.

(See A-70 to A-72)

At the hearing before the Board several persons testified as to Ms. Kimble's fitness to teach. Judy Hoakinson, a fellow teacher of Ms. Kimble's, testified that the incident regarding the gate receipts was not a problem and that Ms. Kimble got along wonderfully with the teachers. (See A-76 to A-77) Another teacher, Ann Waldeir, who had taught there for sixteen years, testified that Ms. Kimble was a good librarian and that the teapot incident did not affect her teaching ability. (See A-77 to A-85)

On the other hand, the administrators who testified talked only in general terms. Principal Findley testified that the instances of alleged takings by Ms. Kimble added caution to the principal's job. (See A-86 to A-87) Superintendent Bruner stated

that the situation regarding the missing set of books "disrupts the school." (See A-87 to A-90) Ex-Superintendent Burmeister said that the teapot incident had "a negative effect." (See A-92) Specific facts were not set out in this testimony.

Furthermore, as discussed above, Ms. Kimble had consistently received good evaluation reports, and her fellow teachers had honored her to a position of trust and confidence as secretary/treasurer of the C.T.A.

Counsel for Ms. Kimble raised the issues of the facial invalidity of the statute and its invalidity as applied in its original brief before the Missouri Court of Appeals. The issue as to the denial of due process because of failure to consider important evidence was raised in the "Motion for Rehearing Or in the Alternative, to Transfer to the

Supreme Court of Missouri," and in the "Suggestions in Support of Respondent's Application for Transfer of Cause . . . to the Supreme Court of Missouri."

ARGUMENT

I. IN HOLDING THAT THE MISSOURI STATUTE ALLOWING TERMINATION OF A TEACHER FOR "IMMORAL CONDUCT" IS NOT UNCONSTITUTIONALLY VAGUE, THE MISSOURI COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A MANNER INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND IN CONFLICT WITH DECISIONS OF AT LEAST ONE FEDERAL COURT OF APPEALS.

A basic principal of the due process clause of the Fourteenth Amendment is that a statute is void for vagueness if its prohibitions are not clearly defined. In Grayned v. City of Rockford, 408 U.S. 104 (1972), this court set forth the reasons vague laws are offensive to the Constitution among which are the fact that they give inadequate notice of exactly what activities are prohibited, and that they can give rise to arbitrary and discriminatory enforcement.

This Court stated in Keyishian v. Board

of Regents of University of State of New York, 385 U.S. 589, 604 (1967), that a statute is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning and differ as to its application." Cf. Bagget v. Bullitt, 377 U.S. 360, 367 (1964). The word "immoral" in M.A.S. § 168.114 (Vernon Supp. 1984) falls within that definition and is therefore violative of the due process clause of the Fourteenth Amendment.

Prior decisions of this Court indicate that statutes generally proscribing "immoral conduct" are unconstitutionally vague. For example in Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1955), in reversing the state court decision at 177 Kan. 728, 282 P.2d 412 (1955), this Court in a per curium opinion held that the words "cruel, obscene,

indecent or immoral, or such as tend to debase public morals," 282 P.2d at 413 (emphasis added), as used in a statute pertaining to the duties of the Kansas State Motion Picture Review Board, were unconstitutionally vague. Similarly, in Superior Films, Inc. v. Department of Education of State of Ohio, 346 U.S. 587 (1954), this Court reversed decisions of courts in New York and Ohio and invalidated statutes of those states giving motion picture censors powers to refuse licensing to a motion picture which is "immoral or is of such character that its exhibition will tend to corrupt morals," Commercial Pictures Corp. v. Board of Regents of University of State of New York, 305 N.Y. 336, 113 N.E.2d 502, 507 (1953) (emphasis added), or which is not "of a moral educational or amusing and harmless

nature." Superior Films v. Dept. of Education, Etc., 159 Ohio St. 315, 112 N.E.2d 311, 314 (1953) (emphasis added).

There is no reason why such a conclusion should not be reached with regard to "immoral conduct" as a ground for dismissal of a teacher. The Ninth Circuit reached such a conclusion in Burton v. Cascade School District Union High School No. 5 et al., 353 F. Supp. 254, 255 (D. Or. 1973), aff'd, 512 F.2d 850 (9th Cir.), cert. denied, 423 U.S. 839 (1975). The district court had invalidated such a statute using the following powerful language:

> Immorality means different things to different people, and its definition depends on the idiosyncracies of the individual school board members. It may be applied so broadly that every teacher in the state could be subject to discipline. The potential for arbitrary and discriminatary enforcement is inherent in such a statute.

The Court then cited United States v. Reese, 92 U.S. 214 (1875), recognizing the

danger of allowing legislatures such unbridled discretion, and the Court went on to state:

> A statute so broad makes those charged with its enforcement the arbiters of morality for the entire community. In doing so, it subjects the livelihood of every teacher in the state to the irrationality and irregularity of such judgments. The statute is vague because it fails to give fair warning of what conduct is prohibited and because it permits erratic and prejudiced exercises of authority.

353 F. Supp. at 255 (footnote omitted). The Court concluded: "No amount of statutory construction can overcome the deficiencies of this statute." Id.

Thus, the lower court decision in this case conflicts with the prior holdings of this Court and the Ninth Circuit. The Missouri Court of Appeals relied on Thompson v. Southwest School District et al., 483 F. Supp. 1170, 1179 (W.D. Mo. 1980), in which

the court, while having serious concerns about whether the term "immoral" in the abstract is unconstitutionally vague, held that such a statute is valid provided that it is interpreted so as to allow dismissal only in those instances where the immoral conduct adversely affects a teacher's performance.

Statutes or ordinances using the term "immoral" have been invalidated on vagueness grounds by federal courts in numerous other cases. Cases invalidating criminal statutes on the ground that the word "immoral" is unconstitutionally vague should be equally applicable here. In Thompson the court held that because of the penal nature of teacher dismissal statutes and because of the property interest in continued employment acquired by teachers under an indefinite contract, the standards for determining

whether such a statute is unconstitutionally vague are the same as those involved in the criminal area.

One case in which a statute using the word "immoral" was found to be unconstitutionally vague is Morgan v. City of Detroit, 389 F. Supp. 922 (E.D. Mich. 1975), in which the court invalidated a portion of an anti-prostitution ordinance which prohibited "leud" and "immoral" acts. In holding the term "immoral" to be unconstitutionally vague, the court stated:

> Assuming there may be a rough consensus in our society as to certain acts that are beyond the pale of the moral, such generalizations are constitutionally too indefinite for criminal prohibition.

389 F. Supp. at 930.

Similarly, in Corporation of Haverford College v. Reeher, 329 F. Supp. 1196 (E.D. Pa. 1971), the court invalidated a statute

denying college financial aid to anyone convicted of a misdemeanor involving "moral turpitude." The court noted that the quoted phrase "tells us very little about what misdemeanors trigger the loss of financial aid eligibility." 329 F. Supp. at 1206. The court went on to state: "If the state insists on legislating morality, we will insist at least that it spell out its moral code . . . ." Id. The court then invalidated the statute for vagueness.

Other cases invalidating similar statutes on vagueness grounds include Ricks v. District of Columbia, 414 F.2d 1097 (D.C. Cir. 1968) (vagrancy statute using the phrase "leading an immoral and profligate life"); Gregory v. Gaffney, 322 F. Supp. 238 (W.D. N.C. 1970) (motion picture obscenity statute making criminal the exhibition of "obscene or

immoral" films); Oestreich v. Hale, 321 F. Supp. 445 (E.D. Wis. 1970) (ordinance prohibiting distribution of publications containing demoralizing or otherwise "immoral" language tending to corruption of morals).

The foregoing cases make it clear that the proscription of "immoral conduct" by the Missouri statute is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." That statute must therefore be invalidated as being violative of the due process clause of the Fourteenth Amendment.

II. IN FAILING TO CONSIDER THE EFFECT OF THE ALLEGED ACTIONS OF MS. KIMBLE ON HER FITNESS TO TEACH, THE MISSOURI COURT OF APPEALS UNCONSTITUTIONALLY APPLIED THE MISSOURI STATUTE.

Even if this Court finds M.A.S. § 168.114.1(2) not to be unconstitutionally vague on its face, it should find that it was unconstitutionally applied in such a manner as to deprive Ms. Kimble of her due process rights under the Fourteenth Amendment. The court did not adequately find that Ms. Kimble's actions adversely affected her ability to teach. Such a finding is a prerequisite for dismissal of a teacher on the ground of immorality.

In Thompson v. Southwest School District, supra, the court held that the phrase "immoral conduct" in the statute was unconstitutionally vague and violative of the Fourteenth Amendment unless applied in such a

way as to require that conduct be shown which renders the teacher unfit to teach.

In the present case the weight of the evidence shows that the alleged actions of Ms. Kimble in no way affected her fitness to teach. Several of Ms. Kimble's fellow teachers testified that the alleged incidents had no effect on her fitness to teach. (See A-76 to A-85) On the other hand, the administrators, who had an axe to grind against Ms. Kimble because of her constitutionally protected C.T.A. activities, spoke only in broad generalities, not explaining exactly how Ms. Kimble was rendered unfit to teach. (See A-86 to A-92)

Furthermore, Ms. Kimble had consistently received good evaluation reports, and her fellow teachers had honored her by electing her to a position of trust and confidence as

secretary/treasurer of the Community Teachers' Association. No explanation was given as to why, if the alleged incidents were so important, they were not of sufficient gravity to rate mention in Ms. Kimble's evaluation reports.

In other cases in which teachers have engaged in much more serious wrongdoing than the alleged activities of Ms. Kimble, courts have held that the teachers were improperly dismissed since there had been an inadequate showing of a nexus between the conduct and the teacher's fitness to teach.

For example, in Golden v. Board of Education of County of Harrison, 285 S.E.2d 665 (W. Va. 1981), it was held that a teacher who had pled nolo contendere to a charge of shoplifting had been improperly terminated on the basis of immorality. The Board had

adopted the view that conviction on the charge was per se immoral conduct and that it could dismiss the teacher if the Board members believed that her act was inconsistent with good order and proper personal conduct. This view was rejected by the court which examined the evidence and concluded that it was insufficient to show that the teacher was unfit to teach. The only evidence in the record before the Board relating to fitness to teach was the favorable testimony of fellow teachers and the principal and assistant principal. In the present case, although there is testimony that the teacher's alleged actions have caused some problems, the testimony is couched in very general terms without specific facts to back it up. On the other hand, several teachers specifically testified that the alleged

misconduct had no effect on Ms. Kimble's fitness to teach.

A similar conclusion was reached in Hoagland v. Mount Vernon School District, 95 Wash. 2d 424, 623 P.2d 1156 (1981) (an appeal by a teacher who had been dismissed by a school board after a felony conviction for having purchased a stolen motorcycle. The court, in remanding the case for an evidentiary hearing, held that the key question was whether the alleged misconduct had any effect on the fitness to teach. Noting that the danger to be avoided is an improvident dismissal and its consequences, the court referred to the following language from Wojt v. Chimacum, 9 Wash. App. 857, 516 P.2d 1099, 1103 (1973):

> Where a teacher is discharged because of classroom deficiences, the consequences are severe. Chances of other employment in the profession are diminished, if not eliminated. Much time,

> effort, and money has been expended by the teacher in obtaining the requisite credentials. It would be manifestly unfair to allow a discharge for a teaching or classroom deficiency which is readily correctable.

Like Ms. Kimble, the teacher in Hoagland continued to teach after completion of the alleged wrongful activity, during which time he received the support and encouragement of his students, their parents, and other teachers and members of his community. Unlike the teacher in Hoagland, Ms. Kimble has not even been convicted of a crime. In fact, the evidence is conflicting as to whether she in fact committed any of the alleged wrongs.

If the termination of the teachers in Hoagland and Golden, who had committed much more serious offenses than those allegedly committed by Ms. Kimble, was erroneous

because of failure to show a nexus between the conduct and fitness to teach, then certainly the termination of Ms. Kimble was erroneous where there was conflicting evidence as to whether she had engaged in the misconduct, and, even if she had, the misconduct was much less severe than that in Hoagland or Golden. Thus, M.A.S. § 168.114.1 (2) was unconstitutionally applied in violation of the due process clause of the Fourteenth Amendment.

III. TERMINATION OF MS. KIMBLE BY THE SCHOOL BOARD WAS IN RETALIATION FOR HER EXERCISE OF HER RIGHT TO FREEDOM OF SPEECH AND THEREFORE RAISES A FEDERAL QUESTION OF PARAMOUNT IMPORTANCE RELATING TO THE FIRST AND FOURTEENTH AMENDMENTS.

This Court in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969), in holding that teachers have the right to speak freely stated:

> It can hardly be argued that teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

In numerous other cases courts have stressed the importance of freedom of speech in the teaching profession in our democratic society. Since scholarship cannot thrive in an atmosphere of suspicion and distrust it is essential that teachers be able to speak out freely without fear of retaliatory dismissal. See Sweezy v. New Hampshire, 354 U.S. 234

(1957). Similarly, in Kleindeinst v. Mandel, 408 U.S. 753, 763 (1972), this Court stated that "the right to freedom of speech is nowhere more vital than in our schools."

It has therefore been held that a teacher cannot be dismissed for exercising his or her legitimate First Amendment right to protest conditions existing within the school system. Perry v. Sinderman, 408 U.S. 593 (1972); Pickering v. Board of Education, 391 U.S. 563 (1968).

The circumstances leading up to the dismissal of Ms. Kimble clearly show that the main reason for her dismissal was to retaliate for her exercise of her right to freedom of speech. Since a right under the First and Fourteenth Amendments is involved, an important federal question is presented as to whether her dismissal was proper.

In November 1981, immediately upon hearing of Ms. Kimble's inquiry of the School Board President as to the reason why the C.T.A. dues of the administrators in the School District were paid by the School Board but the dues of the teachers were not, evidence shows that the Superintendent summoned Ms. Kimble to his office, threatened to take her teaching certificate, and told her he would love to slap her with an unprofessional conduct suit. (See A-93 to A-95) Thereafter, he stated he was going to get rid of Ms. Kimble, and in February 1982 the Superintendent brought a statement of charges against her. (See A-61 to A-65)

All of the charges were of a very trivial nature and consisted primarily of accusations that Ms. Kimble, between the years 1973 to 1982, took and later returned

various extremely inexpensive items from the school premises, thereby engaging in "immoral conduct." Another charge was that she ordered a book without having signed a request form.

All of the circumstances indicate that the real reason she was discharged was her constitutionally protected inquiry of the School Board President, and the other charges were mere pretexts.

This Court, in Mount Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), held that in deciding whether a dismissal is proper, courts must ascertain whether the teacher would not have been dismissed but for her protected activity. Under circumstances similar to those present here, courts in a number of cases have held dismissals of teachers to have been improper.

For example, in Hickman v. Valley Local School District Board of Education, 619 F.2d 606 (6th Cir. 1980), a board had decided not to renew a teacher's contract after the teacher had engaged in various union activities. The final list of reasons for nonrenewal included a number of incidents including allegedly improper playground supervision, guiding the building inspectors on a tour, calling in the County Supervisor on a teacher's salary dispute, taking a missing policy book, and refusing to meet with the principal in conference without another teacher present. The court noted that a decline in the teaching evaluation was directly traceable to the teacher's union activities, which constituted protected speech, and held that but for those activities the teacher would not have been

dismissed.

Similarly, in the present case there is a correlation between Ms. Kimble's protected speech and the decline in her ratings as a teacher, and since the other allegations of misconduct are so trivial in nature, the evidence strongly suggests that she would not have been dismissed but for her exercise of her right to freedom of speech.

Other cases reaching a similar conclusion include Ayers v. Western Line Consolidated School District, 691 F.2d 766 (5th Cir. 1982) (teacher's demurrers about administering two tests and her peripheral involvement with a knife-shakedown incident were found to be mere pretexts for the real reason for dismissal, which was the teacher's criticisms that the school's hiring policies were racially discriminatory; court relied on

inconsistencies in testimony and the fact that the alleged reasons for dismissal were trivial in nature); Simineo v. School District No. 16, Park County, Wyoming, 594 F.2d 1353 (10th Cir. 1979) (notice denying teacher automatic salary increase stated, as grounds therefor, that plaintiff failed to make satisfactory progress, failed to cooperate with other teachers, lacked enthusiasm, and failed to submit reports on time; these were found, based on sudden negative changes in evaluations, to be mere pretexts for the real reason for the penalty --her criticism of changes in teaching methods); Bertot v. School District No. 1, Albany County, Wyoming, 522 F.2d 1171 (10th Cir. 1975) (since list of reasons for non-renewal of contract all related to fact that teacher had helped underground newspaper get

started, teacher held to have been erroneously terminated); Jordan v. Cagle, 474 F. Supp. 1198 (N.D. Miss. 1979) (list of reasons for failure to rehire plaintiff held to be either based on constitutionally protected speech, patently without substance, or merely pretextual, and therefore, evidence showed that teacher was improperly terminated for criticism of school officials for changing regulation which allowed teachers to work at election polls); Johnson v. Butler, 433 F. Supp. 531 (W.D. Va. 1977) (reasons advanced for dismissal of teacher were trivial and were of such a nature as to neither individually nor collectively justify dismissal which was held to have therefore been based on a complaint she made concerning her room assignment).

The present case is distinguishable from

Connick v. Myers, 103 S. Ct. 1684 (1983), in which this Court recently held that a public employee's discharge did not violate her right to speak freely. There the employee, an Assistant District Attorney, shortly after being informed that she was to be transferred to prosecute cases in a different section of the criminal court, distributed a questionnaire she had prepared concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressure to work in political campaigns. This Court held that this speech was not in relation to a matter of public concern, as a teacher's speech must be to be protected by the First Amendment, but only referred to matters of purely personal interest. She wanted to "gather ammunition for another

round of controversy with her supervisors." 103 S. Ct. at 1691.

In contrast, in the present case the question asked by Ms. Kimble did not relate solely to her own personal interest but was for the purpose of putting all teachers on an equal footing with administrators in regard to payment of C.T.A. dues. There was no uniquely personal purpose as there was in Connick. Ms. Kimble's speech related to a matter of pulic concern and was protected speech for which her discharge violated the First Amendment.

IV. SINCE THE DECISION WHICH WAS ADVERSE TO MS. KIMBLE WAS REACHED BY THE BOARD AND THE COURT BELOW WITHOUT CONSIDERING IMPORTANT EVIDENCE SUPPORTING MS. KIMBLE WHICH WAS LOST OR MISPLACED BY THE BOARD, MS. KIMBLE'S IMPORTANT RIGHT TO DUE PROCESS WAS VIOLATED.

The decisions below which were adverse to Ms. Kimble were reached without consideration of important evidence which could have led to a decision favorable to her. In Board of Regents v. Roth, 408 U.S. 564 (1972), this Court held that under the Fourteenth Amendment permanent teachers with indefinite contracts such as Ms. Kimble, have a property interest in continued employment of which they should not be deprived without due process of law. The circumstances in this case show that the Board and courts below failed to consider important evidence which was favorable to Ms. Kimble and therefore her right to due process under the Fourteenth

Amendment was violated.

Ms. Kimble, through her attorney, submitted to the Board her cancelled checks from the period of time in which she was alleged to have taken twenty dollars in gate receipts and to have subsequently replaced it by writing a check. She has attested to the fact that none of the checks was written to the school in the amount of twenty dollars. (See A-70 to A-73) However, when the Board began to consider the evidence, one of the twenty dollar checks from that period was missing. After the adverse decision by the Missouri Court of Appeals, several bank employees signed affidavits attesting to the fact that no checks were written by Ms. Kimble to the school. (See A-66 to A-69)

Had the Board been able to examine all of the twenty dollar checks introduced into

evidence it probably would have made a different decision on the evidence before it. It may have found that there was no pattern of continuing behavior and that Ms. Kimble was not untruthful either with the school personnel or at the hearing.

In numerous cases courts have held that failure of a tribunal to consider significant evidence amounts to a violation of due process. Cases decided in the criminal context should equally apply in the teacher termination context because of the great interest at stake. Analogous authority is Thompson, supra, in which the court held that because of the penal nature of teacher termination statutes, they should be governed by the same standard that is used for determining whether criminal statutes are unconstitutionally vague. Similarly, in

Goldberg v. Kelly, 397 U.S. 254 (1970), this Court held that the rights of confrontation and cross-examination apply not only in criminal cases but also in all types of cases where administrative actions are under scrutiny. Certainly, given the importance of the interest at stake, the due process requirement that all relevant evidence which has been submitted be considered applies in proceedings relating to the termination of the employment of a teacher.

The circumstances here are analogous to those present in Steinmark v. Parratt, 427 F. Supp. 931 (D. Neb. 1977), in which the court held that the defendant had been denied due process in part because critical evidence had been excluded and the defendant had thereby been frustrated in his efforts to develop his theory of lies and prejudice of a

paid informer. The Court relied on Chambers v. Mississippi, 410 U.S. 284, 302 (1973), which requires that an accused be given "a trial in accord with traditional and fundamental standards of due process."

This Court in United States v. Nixon, 418 U.S. 683, 711 (1974), held: "It is the manifest duty of the courts to vindicate [due process rights], and to accomplish that it is essential that all relevant and admissible evidence be produced." Cf. United States v. Kasto, 584 F.2d 268, 272 (8th Cir. 1978), cert. denied, 440 U.S. 930 (1979) ("Fifth Amendment right to due process of law requires that the accused be permitted to introduce all relevant and admissible evidence"); Hughes v. Mathews, 576 F.2d 1250, 1259 (7th Cir.), cert. dismissed, Israel v. Hughes, 439 U.S. 801 (1978)

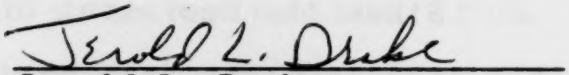
(defendant has due process right "to present relevant and competent evidence in absence of valid justification for excluding such evidence); Clark v. Reid, 441 F.2d 801, 804 (5th Cir. 1971) ("to deny a defendant a fair opportunity to present competent proof in his defense constitutes a denial of fair trial and of due process").

Since the decisions of the Board and the Court below might very well have been different if all of the evidence had been considered, it is clear that Ms. Kimble has been denied her fundamental right to due process, and certiorari should be granted to review those decisions since questions of paramount constitutional significance are presented.

CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to the Missouri Court of Appeals, Western District, and set the matter for plenary consideration.

Respectfully submitted,



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